Supreme Court, U.S.
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No. 92-1711

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARK J. GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD L. PURDON
Colonel, AFLSA, USAF

JEFFREY T. INFELISE
Lieutenant Colonel, AFLSA, USAF

JULES D. SILBERBERG
Captain, AFLSA, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

QUESTION PRESENTED

Whether due process requires that military judges have a fixed term of office.

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OPINIONS BELOW

The order of the Court of Military Appeals, Pet. App. 1a, is not yet reported. The opinion of the Air Force Court of Military Review, Pet. App. 2a-10a, is unreported.

JURISDICTION

The final order and judgment of the Court of Military Appeals was entered on March 3, 1993. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Wilder Air Station in Idaho, petitioner, a member of the United States Air Force, was convicted of one count of sodomy, in violation of Article 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925. He was sentenced to confinement for one year, a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. Pet. 2. The convening authority approved the findings and sentence. The Air Force Court of Military Review initially set aside the actions of the convening authority and returned the case for new review and action by a different convening authority after petitioner informed the court that the first convening authority was himself suspected of misconduct. Pet. App. 3a. After the new convening authority also approved the findings and sentence, the Air Force Court of Military Review affirmed the findings and the sentence. Pet. App. 2a-10a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a.

Trial and appellate judges in the Air Force are not appointed for fixed terms of office. *United States v. Toro*, 34 M.J. 506, 522-523 (A.F.C.M.R. 1991). The Judge Advocate General of the Air Force selects officers for assignment as military judges. Arts. 1, 26, and 66, UCMJ, 10 U.S.C. 801, 826, and 866. Assignment length is at the discretion of the Judge Advocate General, but it is generally for a standard tour of duty, *i.e.*, about three years. Pet. 6.

DISCUSSION

Petitioner claims that his trial and his appeal to the Air Force Court of Military Review were fundamen-

tally unfair because the military judges sitting on those courts do not enjoy fixed terms of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. The question presented by petitioner is not materially different from Question 2 presented by the petitioner in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993). We therefore believe that the Court should hold the petition in this case pending its decision in *Weiss*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's resolution of *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), and should then be disposed of as appropriate in light of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

RICHARD L. PURDON
Colonel, AFLSA, USAF

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JULES D. SILBERBERG
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